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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 NATHANIEL B. WASHINGTON,

12 Plaintiff,

13 v.

14 C/O PERRY, *et al.*,

15 Defendants.

No. C09-5210 FDB/KLS

ORDER TO AMEND OR TO SHOW
CAUSE

16 This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28
17 U.S.C. § 636(b)(1), and Local Rules MJR 3 and 4. The case is before the Court for review of
18 Plaintiff's complaint. After reviewing the Complaint and balance of the record, the Court finds
19 and orders as follows:
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21 A complaint is frivolous when it has no arguable basis in law or fact. *Franklin v.*
22 *Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984). When a complaint is frivolous, fails to state a
23 claim, or contains a complete defense to the action on its face, the court may dismiss an *in forma*
24 *pauperis* complaint before service of process under 28 U.S.C. § 1915(d). *Noll v. Carlson*, 809
25 F.2d 1446, 1448 (9th Cir. 1987) (*citing Franklin v. Murphy*, 745 F.2d 1221, 1227 (9th Cir. 1984)).
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1 Although complaints are to be liberally construed in a plaintiff's favor, conclusory
2 allegations of the law, unsupported conclusions, and unwarranted inferences need not be
3 accepted as true. *Id.* While the court can liberally construe plaintiff's complaint, it cannot supply
4 an essential fact an inmate has failed to plead. *Pena*, 976 F.2d at 471 (*quoting Ivey v. Board of*
5 *Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)).

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7 To state a claim under 42 U.S.C. § 1983, a complaint must allege that the conduct com-
8 plained of was committed by a person acting under color of state law and that the conduct
9 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the
10 United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels*
11 *v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged
12 wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th
13 Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

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15 A plaintiff must also allege facts showing how individually named defendants caused or
16 personally participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d
17 1350, 1355 (9th Cir. 1981). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on
18 the basis of supervisory responsibility or position. *Monell v. New York City Dept. of Social*
19 *Services*, 436 U.S. 658, 694 n.58 (1978). A theory of *respondeat superior* is not sufficient to
20 state a § 1983 claim. *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982).

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22 Plaintiff alleges that "in using his rights to exercise the First Amendment," he was
23 subjected to discrimination and to prison conditions that violated his constitutional rights." Dkt.
24 1-2, p. 3. Plaintiff alleges that he was deprived of property without due process of law and equal
25 protection of the laws. *Id.* He further alleges that on July 30, 2008, while he was searching for
26 rubber gloves to clean his cell at the Day Room Counter, Corrections Officer C. Perry stated

1 loudly, “Get your black nappy head from back here. Yeah, I said it! Don’t ever put your black
2 nappy head back here again.” *Id.* When he asked Defendant Perry for an apology, Defendant
3 Perry refused.

4 The Court cannot infer from the vague and conclusory statements contained in Plaintiff’s
5 complaint that any of the named defendants have violated his First Amendment, due process or
6 equal protection rights. Mr. Washington states that he was exercising his First Amendment
7 rights but does not identify what those rights were. He also states that he was deprived of
8 property without due process of law and equal protection of the laws, but does not identify the
9 property. Nor does he identify when and who took the property from him.

11 In addition, allegations of verbal harassment and abuse fail to state a claim cognizable
12 under 42 U.S.C. § 1983. *See Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997); *Rutledge v.*
13 *Arizona Bd. Of Regents*, 660 F.2d 1345, 1353 (9th Cir. 1981), *aff’d sub nom. Kush v. Rutledge*,
14 460 U.S. 719 (1983); *see, e.g., Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), *amended* 135
15 F.3d 1318 (9th Cir. 1998) (disrespectful and assaultive comments by prison guard not enough to
16 implicate 8th Amendment); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (directing
17 vulgar language at prisoner does not state constitutional claim); *Burton v. Livingston*, 791 F.2d
18 87, 99 (8th Cir. 1986) (“mere words, without more, do not invade a federally protected right”);
19 *Ellingburg v. Lucas*, 518 F.2d 1196, 1197 (8th Cir. 1975) (prisoner does not have cause of action
20 under § 1983 for being called obscene name by prison employee); *Batton v. North Carolina*, 501
21 F.Supp. 1173, 1180 (E.D.N.C. 1980) (mere verbal abuse by prison officials does not state claim
22 under § 1983). This is so even if the verbal harassment is racially motivated. *See Hoptowit v.*
23 *Ray*, 682 F.2d 1237, 1252 (9th Cir. 1982) (federal court cannot order guards to refrain from using
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1 racial slurs to harass prisoners); *Burton*, 791 F.2d at 101 n.1 (use of racial slurs in prison does not
2 offend Constitution).

3 Thus Plaintiff's allegations that Defendant Perry used racial slurs against him, although
4 regrettable, do not state a cause of action under Section 1983.

5 Plaintiff also seeks damages for pain and suffering, but alleges no physical injury.
6 However, "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison or
7 other correctional facility, for mental or emotional injury suffered while in custody without a
8 prior showing of physical injury." 42 U.S.C. § 1997e(e); *see also* 28 U.S.C. § 1346(b)(2)
9 (similar provision added to the Federal Tort Claims Act). This provision "requires a showing of
10 physical injury that need not be significant but must be more than *de minimus*." *Oliver v. Keller*,
11 289 F.3d 623, 627 (9th Cir. 2002).
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13 Here, Plaintiff seeks one million dollars for his "embarrassment, suffering, pain and
14 retaliatory treatment," but has alleged no physical injury. Dkt. 1-2, p. 4.
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16 Plaintiff also names Superintendent Ron Van Boeing as a defendant but includes no
17 allegations as to this defendant. As noted above, a plaintiff must also allege facts showing how
18 each individually named defendant caused or personally participated in causing the harm alleged
19 in the complaint and cannot be held liable solely on the basis of his supervisory responsibility or
20 position. To state a claim under Section 1983, Plaintiff must allege when, where and in what
21 manner Mr. Van Boeing was involved in causing him constitutional harm.
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23 Due to the deficiencies described above, the Court will not serve the complaint. Plaintiff
24 must show cause explaining why this matter should not be dismissed or, alternatively, he may
25 file an amended complaint curing, if possible, the above noted deficiencies. Plaintiff must show
26 cause or file the amended complaint **no later than June 26, 2009**. If Plaintiff files an amended

1 complaint under § 1983, the amended complaint shall consist of a **short and plain statement**
2 showing that he is entitled to relief. Plaintiff shall allege with specificity the following:

- 3 (1) the names of the persons who caused or personally participated in causing the
4 alleged deprivation of his constitutional rights;
- 5 (2) the dates on which the conduct of each Defendant allegedly took place; and
- 6 (3) the specific conduct or action Plaintiff alleges is unconstitutional.

7 Plaintiff shall set forth his factual allegations in separately numbered paragraphs and shall
8 attach only those exhibits relevant to the factual allegations contained within the amended
9 complaint.


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11 Plaintiff is further advised that this amended pleading will operate as a complete
12 substitute for (rather than a mere supplement to) the present complaint. Plaintiff shall present his
13 complaint on the form provided by the Court. The amended complaint must be legibly rewritten
14 or retyped in its entirety, it should be an original and not a copy, it may not incorporate any part
15 of the original complaint by reference, and **it must be clearly labeled the “First Amended**
16 **Complaint” and Cause Number C09-5210 FDB/KLS must be written in the caption.**

17 Additionally, Plaintiff must submit a copy of the “First Amended Complaint” for service on each
18 named Defendant.

19
20 **Plaintiff is cautioned that if he fails to show cause or amend his complaint by June**
21 **26, 2009, the Court will recommend dismissal of this action as frivolous pursuant to 28**
22 **U.S.C. § 1915 and such dismissal will count as a “strike” under 28 U.S.C. § 1915(g).**

23 The Clerk is directed to send Plaintiff the appropriate forms that he may file an amended
24 complaint. The Clerk is further directed to send a copy of this Order and a copy of the General
25 Order to Plaintiff
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DATED this 12th day of May, 2009.


Karen L. Strombom
United States Magistrate Judge